IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. [illegible]

M. E. HEISER,

Petitioner,

vs.

WILLIS MAE WOODRUFF, HOWARD L. WOODRUFF, MARGUERITE B. WOODRUFF, LEONARD WOODRUFF, JR., IDA BELLE WOODRUFF and LEONARD L. WOODRUFF,

Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals, for the Tenth Circuit, and Brief in Support Thereof.

LEONARD L. MEYERS,
208 West Eighth Street, Los Angeles 14,
Counsel for Petitioner.

ROBERT B. TURNBULL,
G. GIBSON,
Of Counsel.

SUBJECT INDEX

PAGE

Petition for Writ of Certiorari to the United States Circuit Court of Appeals, for the Tenth Circuit, and Brief in Support Thereof 1

Opinion below 2

Jurisdiction 2

Questions presented 3

Point I 3

Point II 4

Point III 4

Point IV 4

Point V 5

Point VI 5

Point VII 5

Point VIII 6

Point IX 6

Summary statement of matters involved 7

Reasons relied upon for issuance of writ 9

Specifications of errors 11

Brief in Support of Petition for Writ of Certiorari 13

I.

Summary of argument 13

II.

Argument 14

Res judicata 14

The Noble case 15

PAGE

B. The judgment of the Ninth Circuit Court against the trustee in bankruptcy affirming the judgment of the U. S. District Court at Los Angeles was res judicata as to all matters actually litigated or which might have been litigated therein 17

C. Intrinsic and extrinsic fraud 18

D. Full faith and credit 21

E. The attack by the creditors through the trustee in bankruptcy upon the final judgment of Heiser against Woodruff, the bankrupt, was a collateral attack 22

F. The trustee represents all creditors and they are bound by his action and the judgment against him 23

G. A final judgment cannot be attacked for alleged perjury in its procurement 24

Conclusion 27

Appendix:

Opinion of Tenth Circuit in Case No. 3052 ..... App. p. 1

Opinion of Ninth Circuit in Case No. 9356 ..... App. p. 11

Opinion of Judge Rice, United States District Court, in Case No. 7623 ..... App. p. 16

Referee's certificate on review ..... App. p. 25

TABLE OF AUTHORITIES CITED

CASES.	PAGE
Beebe v. O'Reilly, 124 Fed. (2d) 750	15
Beneficial Loan Co. v. Noble, 129 Fed. (2d) 425	15, 27
Brady et al. v. Beams et al., 132 Fed. (2d) 985	15
Bryan v. Hamrick, 102 Fed. (2d) 145	15
Cherokee Public Service Co., In re, 94 Fed. (2d) 536	27
Chicot Co. v. Baxter State Bank, 308 U. S. 371	22, 27
Coopdge v. Clinton, 72 Fed. (2d) 531	21
Cromwell v. Sac. Co., 94 U. S. 351	22
Fischer v. Pauline Oil Co., 60 Sup. Ct. 535	23
Grubb v. Public Utilities Comm., 261 U. S. 470	22, 27
Hart Steel Co. v. RR Supply, 244 U. S. 294	15
Jackson v. Heiser, 111 Fed. (2d) 310	19, 27
Jackson v. Irving Trust Co., 310 U. S. 621, 85 L. Ed. 10	27
Lewensohn, In re, 121 Fed. 539	23
Moffett v. Robbins, 81 Fed. (2d) 431	17, 27
Northwestern Pac. Railroad v. Slaught, 205 U. S. 122, 27 S. Ct. 442, 51 L. Ed. 738	23
Paramount Public Corp., Re, 85 Fed. (2d) 42	20
Pepper v. Litton, 308 U. S. 295	10, 12, 15
Picot v. Cohn, 91 Cal. 129, 25 Pac. 970	18, 25
Reuping, Fred., etc. v. Fort Green Nat'l Bank, 102 Fed. (2d) 373	23
Root v. Woolworth, 150 U. S. 401; 37 L. Ed. 1123, 14 S. Ct. 136	20
Stoll v. Gottlieb, 305 U. S. 165, 59 S. Ct. 134, 83 L. Ed. 104	15
Sun Indemnity v. United States, 91 Fed. (2d) 120	15
Titus v. Wallick, 306 U. S. 282	21, 27

PAGE

United States v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93 ..... 18, 25

United States v. U. S. Fidelity & Guaranty Co., 106 Fed. (2d) 804 15

Werlein v. New Orleans, 177 U. S. 390, 20 Sup. Ct. 682, 44 L. Ed. 871 17

STATUTES.

Judicial Code, Sec. 240 (28 U. S. C. A. 347, and Act of Feb. 13, 1925, Chap. 229, 43 Stat. 9365, Sec. 240A) 2

Rules for the Supreme Court of the United States, Rule 5(b) 2

TEXTBOOKS.

31 American Jurisprudence, p. 223, para. 655 20

31 American Jurisprudence, p. 230, para. 64 20

2 Freeman on Judgments, 5th Ed., pp. 1437, 1438 17

3 Freeman on Judgments, 5th Ed., p. 2567 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. ..... 1 .....

M. E. HEISER,

Petitioner

vs.

WILLIE MAE WOODRUFF, HOWARD L. WOODRUFF, MARGUERITTE B. WOODRUFF, LEONARD WOODRUFF, JR., IDA BELLE WOODRUFF and LEONARD J. WOODRUFF,

Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals, for the Tenth Circuit, and Brief in Support Thereof.

To the Honorable Chief Justice and to the Associate Justices of the Supreme Court of the United States:

The petitioner M. E. Heiser respectfully prays that a writ of certiorari issue to review a judgment of the Circuit Court of Appeals for the Tenth Circuit in that certain cause therein entitled "Willie Mae Woodruff, Howard L. Woodruff, Margueritte Woodruff, Leonard J. Woodruff, Jr.; Ida Belle Woodruff, and Leonard J. Woodruff, Appellants, vs. M. E. Heiser, Appellee," being therein No. 3052. Said judgment was entered by said Circuit Court of Appeals on August 11, 1945 [R. Vol. II, p. 1246].

The decision is not unanimous, but contains an independent and dissenting opinion. A petition for rehearing was filed by M. E. Heiser within the time allowed therefor by rule of court and is copied in the record herein [Vol. II. p. 1253] and an order denying said petition for rehearing was filed on September 4, 1945 [R. App. p. 1303].

Opinion Below.

The majority opinion of the Circuit Court of Appeals for the Tenth Circuit in this cause is set forth in full in Record, Appendix page 1293, and is copied at length in the Appendix to this petition at pp. 1-10. There is also included in both references the dissenting opinion.

Jurisdiction.

The jurisdiction of this court is invoked under Section 240 of the Judicial Code, as amended in 28 U. S. C. A. 347, and Act of Feb. 13, 1925, Chap. 229, 43 Stat. 9365. Sec. 240A, amended May 22, 1939. This petition for writ of certiorari is filed within three months after the filing of said opinion and judgment (August 11, 1945) and the denial of the petition for rehearing (September 4, 1945). This application for writ is presented October 5, 1945, and is made pursuant to paragraph 5(b) of Rule 38 of the rules of this court and in particular the part thereof which suggests that a writ of certiorari may be issued where a Circuit Court of Appeals has rendered a decision in conflict with a decision of another court of appeals on the same matter, and has decided an important

question of local law in a way in conflict with applicable local decisions and has decided an important question of federal law which has not been but should be settled by this court and has so far departed from the accepted and usual course of jurisdictional proceedings and/or so far sanctioned such a departure by the lower court, as to call for an exercise of this court's power of supervision.

The cause sought to be reviewed herein involves the decision of an important question of *res judicata*; the opinion of the said Court of Appeals for the Tenth Circuit herein sought to be reviewed is in direct conflict with an opinion on the same subject made between the same parties theretofore rendered by the Circuit Court of Appeals in the Ninth Circuit. [Opinion, R. Vol. I, p. 291 and copied at length in the Appendix hereto at pp. 1-10.] The decision of the Ninth Circuit Court [R. Vol. I, p. 291] is unanimous and is also copied at length in the Appendix hereto [pp. 11-15]. The decision of the Tenth Circuit Court is a two to one decision [R. Vol. II, App. p. 1239] also Appendix hereto [pp. 16-22]; the dissenting justice writing a separate opinion [R. Vol. II, App. p. 1243] also Appendix hereto [pp. 6-10].

Questions Presented.

Point I.

Does a final judgment of the Ninth Circuit Court of Appeals against a trustee in bankruptcy and the bankrupt have "full faith and credit" in the United States District Court of Oklahoma, or can the same subject matter of such final judgment be relitigated on its merits by the referee in bankruptcy?

Point II.

Is a final judgment of the Ninth Circuit Court of Appeals which held that an independent equity action brought by trustee in bankruptcy from Oklahoma, seeking to set aside a final judgment of the United States District Court of California for alleged fraud in its procurement, is without merit and which affirmed the judgment attacked, *res judicata* of that subject and binding upon the United States District Court of Oklahoma, in the presence of a well grounded plea of *res judicata,* to prevent the retrial of the same issues before the Oklahoma referee in bankruptcy.

Point III.

In the presence of a well grounded plea of *res judicata* may a referee in bankruptcy, under guise of "examining the underlying claim," ignore the rules of *res judicata*—estoppel by judgment and full faith and credit—and by a trial of the merits reverse a final judgment of, (1) a United States District Court; (2) a final judgment of the United States Circuit Court of Appeals—both rendered on the identical subject matters, to-wit: fraud and perjury alleged in the procurement of the judgment?

Point IV.

May creditors in bankruptcy, by their trustees, select a California forum, for the determination by litigation of questions of fraud, etc., alleged to be used in procuring a final judgment against the bankrupt, and after adverse final decisions in the United States District Court of California and of the Ninth Circuit Court of Appeals, thereafter require the Oklahoma referee to again try the

same issues on their merits, or are they bound by the rules of *res judicata*, when presented by a well grounded plea?

POINT V.

May a trustee in bankruptcy in Oklahoma (and his bankrupt) acting under written order expressly instructing the trustee so to do, select the California federal courts, both District and Ninth Circuit, as the forum to litigate the questions of intrinsic and extrinsic fraud as grounds to set aside a final judgment of the California court, and after suffering adverse decisions in both courts then relitigate intrinsic fraud before the Oklahoma referee and thus allow the referee the opportunity to reverse the said final decision of the United States District Court and the Ninth Circuit Court of Appeals?

POINT VI.

Is it the intent and purpose of the Bankruptcy Act to afford a means (without charging extrinsic fraud) whereby a bankrupt and/or his creditors may use the Act to accomplish a result, the subject matter of which had proceeded to final judgment against the bankrupt prior to bankruptcy, and thereafter against the trustee in bankruptcy in courts having jurisdiction thereof, and concerning which no other or different result could have been accomplished without the use of the Bankruptcy Act?

POINT VII.

Is a final judgment of the United States District Court for Southern California against the trustee in bankruptcy, in an independent action filed by him to test the validity of a judgment theretofore rendered by the same court against the bankrupt prior to bankruptcy, *res judicata* as to all

matters placed in issue by the trustee or litigated therein, and which may or could have been litigated by the trustee therein?

POINT VIII.

Is not a trustee in bankruptcy as a litigant attacking for fraud the validity of a judgment in an independent action or proceeding in the United States District Court, bound to then present and prove every available ground of fraud of which he has knowledge or belief, or having charged fraud in such action, which was denied and not proved, can he "apparently" abandon the charges that the material allegations in the original complaint upon which the original judgment was rendered, were knowingly false; that such judgment was secured through the use of perjured testimony given by the plaintiff and that a fraud was thus committed upon the court, and then after his independent action was determined against him by the court which rendered the original judgment and that judgment affirmed on his appeal to the Circuit Court, can these same charges of intrinsic fraud in obtaining the original judgment again be subsequently litigated before the referee?

POINT IX.

Are findings of a United States District Court on a Writ of Review from an order of a referee disallowing a claim based upon a final judgment of the United States District Court, necessary, where the findings of the referee contained in his certificate on review are before the Circuit Court of Appeals and show that the same issues were theretofore presented by the trustee in bankruptcy in an independent action filed by the trustee before the United States District Court that rendered said final judgment, and that

said action was determined against the trustee, and upon his appeal such determination was affirmed by the Circuit Court of Appeals and a well grounded plea of *res judicata* setting forth said judgment was timely presented to such referee and by him denied?

Summary Statement of Matters Involved

Prior to the Bankruptcy proceeding of Leonard J. Woodruff in Oklahoma, the United States District Court for Southern District of California rendered a judgment of $278,000.00 against Woodruff, in favor of Heiser. Evidence was taken before the judgment was given. After the entry Woodruff appeared and moved to vacate the judgment on the ground (among others) that it had been procured by perjury as to values of the gems the Court found he had defrauded Heiser of. Woodruff without waiving his right to appeal stipulated [R. Vol. I. p. 263] with Plaintiff Heiser that the court should hear evidence to determine if the values alleged in the complaint were right or wrong—Over 10 days of trial evidence was offered. When matter was submitted trial court found values were as represented and refused to set aside judgment. The judgment became final. Woodruff thereafter filed voluntary Bankruptcy petition in Oklahoma and was adjudicated. A Trustee was elected by creditors—All creditors (excepting Heiser) filed written petition alleging California judgment was obtained by fraud and perjury, asking Referee in Oklahoma to authorize and instruct Trustee to go to California and attack the judgment [R. Vol. I. p. 20]. Trustee Jackson also in a separate petition asked the same authority [R. Vol. I. p. 21]. On these petitions the Referee ordered such action taken [R. Vol. I. p. 28]. The Trustee Jackson joined by Bankrupt Woodruff then filed in the California District Court alleging fraud

in the procurement of the judgment, perjury as to the values of the gems converted by Woodruff and many other grounds. The District Court heard and denied the relief. Trustee Jackson and Bankrupt Woodruff appealed to United States Ninth Circuit Court of Appeals, at San Francisco, California. The decision of that court is found in Appendix hereto and in the ~~[~~R. Vol. I. p. 291~~]~~, its citation is ~~[~~111 F. (2d) 310~~]~~ The Ninth Circuit decided against Trustee Jackson and Woodruff in every respect. The judgment became final.

After the judgment so became final, the same identical charges, in the same words and identical worded phrases were filed as objections to the allowance of the Heiser judgment as a filed claim before the Oklahoma Referee.

Heiser answered the objections by pleading, *res judicata* by reason of the California Federal Court decisions; estoppel by judgments, and "full faith and credit."

While the Referee ignored these defenses, and retried the matter on its merits, the judgment creditor refused to rely on the merits and stood on his final judgments. On a review of the Referee's findings the District Court of Eastern Oklahoma, reversed the Referee. That decision on the "claim of Heiser" is best stated by Judge Rice himself in his findings and opinion [R. Vol. I. p. 156, also in Appendix hereto] reading: ~~[Copy from Vol. I. p. 156 heading "Claim of Heiser thru p. 157 to end of" on p. 158].~~ (Here ~~quote only~~ see "Claim of Heiser" portion of Judge Rice decision ~~from our~~ at p. 17 et seq. of Appendix hereto. ~~already set up or from Record.)~~

From that decision an appeal was taken by Bankrupt, and certain family creditors. The Tenth Circuit does not agree with the District Court, and by the 2 to 1 decision lays down the law of the case.

While sending the case back to the District Court for findings it never the less may constitute the law of the case and this review is absolutely necessary to protect petitioners California judgments.

Further essential facts of the case are stated in the opinions and decisions attached to this petition as an appendix, and in the interest of brevity are not repeated.

Reasons Relied Upon for Issuance of Writ.

The reasons relied upon briefly stated are:

1. The Ninth Circuit has held that the action of the Oklahoma Trustee in Bankruptcy in attacking the California Judgment in California constituted an independent equitable action to set aside the judgment on the alleged and pleaded grounds that it was obtained by fraud practiced on the court and perjury of witnesses. That action was decided adversely to the contentions of the Trustee and Bankrupt. The decision became final. (Citation of case, 111 F. (2d) 310.)

A litigant may not plead all his grounds and try part only, may not reserve to himself part for future litigation. That is *res judicata* of that which was decided or could have been decided in that action. The dissenting opinion of Justice Huxman, points out the law and decision in this regard [R. Vol. II. p. 1243] (Also in Appendix hereto p. 6).

2. The question of fraud in the procurement of the California judgment has already been twice decided adversely to Bankrupt and his Trustee before the Referee in Bankruptcy, attempted to retry it. Justice Huxman, states our position in his dissent in the Third paragraph thereof. [App. p. 6.] ~~(Suggest we quote that paragraph which goes over on the next entire page—in its entirety.)~~ et seq

3. The majority decision if allowed to be the law of the case permits a Referee to allow a Trustee to select a forum and raise all points involved and when the final decisions are adverse to the Bankruptcy Trustee, and Estate, to then ignore the final decisions and reverse the United States District Court for Southern California, and reverse the Ninth Circuit Court of Appeals.

4. The majority decision if it is permitted to stand without review here establishes that even when well grounded and pleaded the defenses of "full faith and credit," "estoppel by judgment", and "res adjudicata" may be ignored by a Referee in Bankruptcy.

5. The majority decision of the Tenth Circuit places an extended construction on *Pepper v. Litton*, 308 U. S. 295, and wrongfully holds that under that decision a Referee in Bankruptcy may under the guise of "examining the underlying claim" retry the merits of a judgment final in its scope both to "debt" and "fraud and perjury used in its procurement."

6. The Bankrupt attacked the judgment after its rendition and before Bankruptcy—the trial District Court in Southern California permitted evidence to be taken over 10 trial days to determine if he had given a judgment by being deceived as to values—After the 10 day hearing the court held that he would not disturb the judgment, that he had not been imposed on and that the values shown were the same as shown to him on the rendering of the judgment. He refused to set it aside and so ordered.

After Bankruptcy—the Trustee and the Bankrupt jointly again attacked the judgment—this time under express written orders of the Referee in Oklahoma. The decisions in both California Federal Courts being again adverse to Trustee and Bankrupt—became final.

Specifications of Errors.

The Circuit Court of Appeals erred:

(1) In holding that a final judgment of the Ninth Circuit between the same parties on same subject matter was not *res adjudicata* as to specific frauds alleged but not proven by losing party.

(2) In holding that a Referee in Bankruptcy may reverse the final judgment of the Ninth Circuit Court rendered against his Trustee in Bankruptcy on questions of intrinsic fraud and perjury alleged to have been perpetrated in the procurement of said judgment.

(3) In holding that after a Trustee in Bankruptcy has selected a forum to try his contentions that a given creditors judgment had been procured by fraud and perjury and had suffered adverse final judgments against him on these subjects in said court, the Ninth Circuit, that the Referee in Bankruptcy could again relitigate same subjects and reverse final judgment of Ninth Circuit.

(4) In holding that after litigants (Trustee and Bankrupt) has expressly attacked a final judgment for alleged fraud and perjury in its procurement that they could abandon one or more grounds, leave them for future litigation, and not be bound by the rule of *res adjudicata* or estoppel by judgment when the decision went against the litigating Trustee and Bankrupt and in favor of the judgment creditor.

(5) In holding that the decision of the Ninth Circuit holding that the proceeding before it was an independent equity action attacking a final judgment for fraud in its procurement and that there was no fraud proven or found is not entitled to "full faith and credit" in the District Courts of the Tenth Circuit.

6. In holding that *Pepper v. Letton*, is authority for a Referee in Bankruptcy to ignore a final judgment as *res adjudicata*—when validity of judgment has been attacked unsuccessfully by the Trustee in Bankruptcy on alleged grounds of fraud in its procurement.

Petitioner respectfully represents that said questions properly appear in the record and were raised before the trial Court (Referee) and the United States District Court (on Writ of Review), and in the Circuit Court of Appeals.

Wherefore, your petitioner respectfully prays that a Writ of Certiorari issue out of and under the Seal of this Honorable Court directed to the Circuit Court of Appeals for the Tenth Circuit, requiring said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings in said Circuit Court of Appeals in the case therein numbered 3052, and entitled "Willie Mae Woodruff, Howard Woodruff, Margueritte Woodruff, Leonard Woodruff, Jr., Ida Belle Woodruff, and Leonard Woodruff, Appellants v. M. E. Heiser, Appellee," to be reviewed and determined by this Honorable Court, as provided by law; that the judgment of said Circuit Court of Appeals herein be reversed by this Honorable Court, and for such further relief as to this Court may seem proper and just in the premises.

[Dated Oct. 1, 1945.]

LEONARD J. MEYBERG,
Counsel for Petitioner.

RUPERT B. TURNBULL,
T. G. GIBSON,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. .....

M. E. HEISER,

Petitioner

vs.

WILLIE MAE WOODRUFF, HOWARD L. WOODRUFF, MARGUERITTE B. WOODRUFF, LEONARD WOODRUFF, JR., IDA BELLE WOODRUFF and LEONARD J. WOODRUFF,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

SUMMARY OF ARGUMENT.

A. RES JUDICATA.

B. THE JUDGMENT OF THE NINTH CIRCUIT COURT AGAINST THE TRUSTEE IN BANKRUPTCY AFFIRMING THE JUDGMENT OF THE U. S. DISTRICT COURT AT LOS ANGELES WAS RES JUDICATA AS TO ALL MATTERS ACTUALLY LITIGATED OR WHICH MIGHT HAVE BEEN LITIGATED THEREIN.

C. INTRINSIC AND EXTRINSIC FRAUD.

D. FULL FAITH AND CREDIT.

E. THE ATTACK BY THE CREDITORS THROUGH THE TRUSTEE IN BANKRUPTCY UPON THE FINAL JUDGMENT OF HEISER AGAINST WOODRUFF, THE BANKRUPT, WAS A COLLATERAL ATTACK.

F. THE TRUSTEE REPRESENTS ALL CREDITORS AND THEY ARE BOUND BY HIS ACTION AND THE JUDGMENT AGAINST HIM.

G. A FINAL JUDGMENT CANNOT BE ATTACKED FOR ALLEGED PERJURY IN ITS PROCUREMENT.

II.
ARGUMENT.

A. Res Judicata.

On the question of *res judicata* we submit that the opinion of the Honorable Judge Eugene Rice of the District Court on review of the referee's findings which we have set out in full in the STATEMENT OF MATTERS INVOLVED, and which is also included in the Appendix hereto and is in the Record, Volume I at Pages 156, 157 and 158, clearly states the sound rule of law announced by this Honorable Court applying to the facts in this case. The same is true of the dissenting opinion of the Honorable Judge Huxman of the Circuit Court appearing in the Appendix hereto at page 6, and also in the Record Pages 1243-1246. We adopt the citations and quotations from the decisions set out in these opinions on the subject of *res judicata* and we submit, as to the intrinsic fraud, these rules of law apply in bankruptcy courts as well as all courts of equity. The doctrine of *res judicata* is not a technical defense. It is a rule of fundamental

and substantial justice of public policy and of peace and must be enforced by the courts. (*Hart Steel Co. v. RR Supply*, 244 U. S. 294, 299; *Sun Indemnity v. U. S.*, 91 Fed. (2d) 120, 121; *U. S. v. U. S. Fidelity & Guaranty Co.*, 106 Fed. (2d) 804, 809; *Bryan v. Hamrick*, 102 Fed. (2d) 145, 152.)

THE NOBLE CASE.

The Tenth Circuit Court in *Beneficial Loan Co. v. Noble*, 129 Fed. (2d) 425, reversing the District Court, which permitted an attack on the final judgment of a Colorado State Court, after discussing the case of *Pepper v. Litton*, 308 U. S. 295, said:

> "Here, however, the bankruptcy court did not undertake to exercise its jurisdiction with respect to the allowance, rejection, or subordination of a claim, but undertook to inquire into the merits of the cause of action . . . that is to say, it undertook to relitigate the matters which had been held and determined by the state court. This, we think, it was precluded from doing under the doctrine of *res judicata*."

In this case the court cited *Beebe v. O'Reilly*, 124 Fed. (2d) 750, which was decided on the authority of *Stoll v. Gottlieb*, 305 U. S. 165 (59 S. Ct. 134, 83 L. Ed. 104). The Tenth Circuit in a unanimous opinion written by Hon. Justice Bratton in *Brady et al. v. Beams et al.*, 132 F. (2d) 985; says, "A federal court sitting in equity may vacate a judgment for extrinsic or collateral fraud but not for fraud which was in issue ~~not~~ in former suits."

In the majority opinion in the case at bar the Tenth Circuit now holds in defiance, we submit, of its own decisions and of the accepted decisions of every other Circuit, that notwithstanding that the trustee in bankruptcy has in an independent action in the District Court at Los Angeles tested the validity of the original judgment and suffered judgment against him, and on the trustee's appeal to the Ninth Circuit it was held that the judgment was valid, the same creditors, upon whose application the referee ordered the trustee to take those proceedings, may now relitigate not only the matters which had been heard and determined by the District Court in Los Angeles at the time of the rendition of the original judgment and the proceedings subsequent thereto by the bankrupt, but this notwithstanding the judgment against the trustee in the District Court in his attack on this judgment in an independent action and the judgment of the Ninth Circuit Court of Appeals against him upon his appeal therefrom. After all these proceedings and these judgments the Tenth Circuit Court now holds that subsequent thereto these same creditors may again relitigate before the referee the charges of these creditors of intrinsic fraud, that "the contention of the material allegations in the complaint were knowingly false, that the judgment was secured through the use of perjured testimony given by Heiser, and that a fraud was thus committed on the court and the parties."

B. The Judgment of the Ninth Circuit Court Against the Trustee in Bankruptcy Affirming the Judgment of the U. S. District Court at Los Angeles Was Res Judicata as to All Matters Actually Litigated or Which Might Have Been Litigated Therein.

The case of *Moffett v. Robbins*, 81 Fed. (2d) 431, is a decision of the United States Circuit Court written by Honorable Justice Bratton who also wrote the majority opinion in the case at bar. Therein he sets forth the rule of law which we submit is prevalent throughout all the circuits of the United States Courts but which he reverses in the case at bar. In that case it was held that a judgment rendered by a court having jurisdiction is conclusive upon the parties and their privies in a subsequent action on the same cause of action as to all matters actually litigated or which might have been litigated therein, and this, notwithstanding that the judgment may have been erroneous in fact or in law.

This court in *Werlein v. New Orleans*, 177 U. S. 390, 398, 20 Supreme Court 682, 44 L. Ed. 871, held: "In the National courts an adjudication is conclusive of all questions of both law and fact upon which the rights of the parties depend, of things which might have been determined as well as those which were." The rule is well stated in Freeman on Judgments, 5th Ed., Vol. 11, pages 1437 and 1438: "A single cause of action may have been based on several grounds, in which event, whether actually litigated or not they are all merged in the judgment which bars a new action for the same cause of action though on a different ground from the first."

C. Intrinsic and Extrinsic Fraud.

In the petition for rehearing which is set forth in full with the brief thereon in the Record, Volume II, pages 1253 to 1291, we have briefed fully the causes of intrinsic and extrinsic fraud and the holdings of the Supreme Courts of California and Oklahoma with regard thereto. For the sake of brevity we do not repeat the discussions set out therein except to call this Honorable Court's attention to the fact that the ruling of the Tenth Circuit Court, in the case at bar, permits relitigation before the referee, of charges of intrinsic fraud, namely, "that the material allegations in the complaint were knowingly false, that the judgment was secured through the use of perjured testimony given by Heiser and that a fraud was thus committed on the court and the parties." As we have shown at the beginning from the leading case of *U. S. v. Throckmorton*, 98 U. S. 61, 66, 25 L. Ed. 93, which refers to *Pico v. Cohn*, 91 Cal. 129, 133, 25 Pac. 970, which is the ruling case in California, the Court comments on the distinguishing features of these two types of fraud, concluding that equitable aid will be granted where it appears that "by some fraud practiced by the party securing relief against the judgment or decree, that party has been prevented from presenting all of his case to the court." Freeman on Judgments, Volume III, page 2567, 5th Ed. 25, put the accent on what is perhaps the main distinction between intrinsic and extrinsic fraud: "It must be borne in mind that it is not fraud in the cause of action but fraud in the management which entitles the party to relief."

In permitting the referee to now relitigate the charge "that the material allegations in the complaint were know

ingly false" would be to reopen an issue which was decided first by the original judgment; second, the proceedings of Leonard J. Woodruff, in the Los Angeles bankruptcy court before the bankruptcy proceedings; third, by the proceedings of the trustee in bankruptcy in his independent action before the United States District Court at Los Angeles, and fourth, by the judgment of the Ninth United States Circuit Court, all of which denied relief on this issue. The unanimous opinion of the Ninth Circuit Court against the trustee in bankruptcy and the bankrupt in *Jackson v. Heiser*, 111 Fed. (2d) 310, stated: "that the charge of fraud in obtaining the judgment was denied, not proved, and apparently abandoned."

We submit that the fact that the nature of the fraud referred to does not appear in the Ninth Circuit decision, the charge of fraud referred to, standing alone, is broad enough to cover every possible issue of fraud, not alone extrinsic but also intrinsic. All fraud was thus determined by the final judgments on this charge and cannot again be litigated. We urge that it is contrary to the law of the United States Courts and of the State Courts of California and of Oklahoma, to hold otherwise as set forth in detail in the brief on the petition for rehearing. [Record, Vol. II, p. 1253.] The fraud charged now before the Court is intrinsic fraud and had been theretofore litigated by the bankrupt and creditors through their trustee in bankruptcy in the California courts. The judgments theretofore rendered are *res judicata* and it is contrary to all law that the issue of such intrinsic fraud can now be relitigated by the referee in the presence of a well grounded plea of *res judicata* and a different judgment rendered by the trustee, the effect of which is to reverse the United States District Court at Los Angeles and the

Ninth Circuit Court which has already found against the trustee in bankruptcy on the same issues, in final judgments.

The rule set out in *Root v. Woolworth*, 150 U. S. 401, 37 L. Ed. 1123, 14 S. Ct. 136, is stated in 31 Am. Jur. paragraph 654 at page 230:

> "The acts for which a court of equity will on account of fraud, command relief from a judgment have relation to extrinsic or collateral fraud; intrinsic fraud is not sufficient for equitable relief. Fraud has been regarded as intrinsic within the meaning of this rule where the fraudulent acts pertain to an issue involved in the original action, or where the acts constituting the fraud were, or could have been, litigated therein"

and at paragraph 655 at page 232 of 31 Am. Jur. giving the reasons for the distinction:

> "Equitable relief from a judgment is denied in cases of intrinsic fraud, on the theory that which has been tried and passed on in the original action should not be retried in an action for equitable relief against the judgment, and that otherwise litigation would be interminable."

We submit this equity rule applies to the equity powers of the bankruptcy court as to a retrial of the issues tendered by the trustee before the Los Angeles Court. We submit that it was held in 85 Fed. (2d) 42, In re *Paramount Public Corp.* and is the general rule that a judgment resulting from litigation at the direction or with the consent of the bankruptcy court is liquidated by such a final judgment, all of which law has been disregarded and reversed by the decision in the case at bar.

D. Full Faith and Credit.

We submit that the referee in bankruptcy was legally bound to give full faith and credit to the judgment of the United States District Court for the Southern District of California against the trustee in bankruptcy and the judgment of the United States Circuit Court of Appeals for the Ninth Circuit against the trustee in bankruptcy.

In the case of *Titus v. Wallick*, 306 U. S. 282 and in *Coolidge v. Clinton*, 72 Fed. (2d) 531, Tenth Circuit, the full faith and credit clause has been judicially defined. In these cases the defeated party claimed that he could collaterally attack a judgment for fraud. The opinion in the Supreme Court by the Honorable Justice Hughes held that the lower court, in permitting such an attack, had done so in full violation of the full faith and credit clause of the United States Constitution. In the case of *Milliken v. Meyer, supra*, the Honorable Justice Douglas stated:

> "The full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic or the consistency of the decision, or the validity of the legal principles upon which the judgment is based."

We submit that the referee cannot relitigate the issue of intrinsic fraud as to the charge of falsity of the allegations of the complaint or perjured testimony in obtaining the original judgment of March 20, 1939, but must respect the judgment of the United States District Court at California and the Ninth Circuit Court against the trustee in bankruptcy on his collateral attack wherein he charged both intrinsic and extrinsic fraud in obtaining the original judgment.

E. The Attack by the Creditors Through the Trustee in Bankruptcy Upon the Final Judgment of Heiser Against Woodruff, the Bankrupt, Was a Collateral Attack.

The opinion by Chief Justice Hughes in *Chicot Co. v. Baxter State Bank*, 308 U. S. 371, 378, holds that a judgment is *res judicata* not only as to those matters which were decided but also as to all matters which could have been presented for decision. The opinion of Chief Justice Hughes in that case, wherein he quotes *Grubb v. Public Utilities Comm.*, 261 U. S. 470, and *Cromwell v. Sac. Co.*, 94 U. S. 351, might well be said regarding the view of the majority opinion of the Circuit Court of the Tenth Circuit of the case at bar.

> "Such a view is contrary to the well settled principal that *res judicata* may be pleaded as a bar not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, but also as respects any other available matter which might have been presented to that end."

And with regard to collateral attack the opinion states:

> "And determinations of such questions, while open to direct review may not be assailed collaterally."

The opinion of the Tenth Circuit Court in the case at bar now permits another collateral attack to test the validity of this original judgment under a theory of testing the underlying claim, but the grounds are the charge that the material allegations of the original complaint were knowingly false and that the judgment was secured through the use of perjured testimony given by Heiser, thus a collateral attack on the ground of intrinsic fraud, notwithstanding the judgments of the United States Dis-

trict Court at Los Angeles and the Ninth Circuit Court against the trustee in bankruptcy in his independent action instigated there in which he included fraud as a ground of his attack, which was not proved.

F. The Trustee Represents All Creditors and They Are Bound by His Action and the Judgment Against Him.

In the case at bar the objecting creditors all sought and obtained orders requiring the trustee in bankruptcy, P. M. Jackson, to litigate and test the validity of the Heiser judgment in the federal courts of California. [Record of Vol. 1, p. 28.] In *Fischer v. Pauline Oil Co.* 60 Supreme Court, p. 535, this court held:

> "Where a trustee attacks a judgment in the court that rendered it and is unsuccessful he is estopped from setting up the same defense in the bankruptcy court."

In *Fred Reuping, etc. v. Fort Green Nat'l Bank*, 102 Fed. (2d) 373 (3d Cir.), it was held that a "claim, so far as he relies upon bankruptcy trustee to protect the estate against improper claims, is bound by what the trustee does or fails to do." In the foregoing case is cited *In re Levensohn*, 121 Fed. 539, "The trustee reprtsents all the creditors and may therefore be relied upon to present all proper objections to the claims of those whose standing is questionable."

In *Northwestern Pac. Railroad v. Slaught*, 205 U. S. 122, 27 S. Ct. 442, 51 L. Ed. 738, the court found that there was no substantial difference between the allegations previously made and now, but if there be a difference the claim now is one that respondents were required to bring

forward in the prior suit. We submit that it was never the intention of Congress to clothe a bankruptcy court with jurisdiction to reopen judgments and try cases summarily before a referee for intrinsic fraud where a court had already rendered the judgment and such court had jurisdiction of the subject matter and the parties. Of course where the judgment was obtained by fraud or collusion the bankruptcy court would have jurisdiction, but even then it could not reopen the judgment after the trustee in bankruptcy has once proceeded in the court where the judgment was rendered, to have the judgment vacated and set aside in an independent proceeding and was unsuccessful, the creditors cannot again set up the same matter before the bankruptcy court in face of a well grounded plea of *res judicata*.

G. A Final Judgment Cannot Be Attacked for Alleged Perjury in Its Procurement.

Here under the guise of examining the underlying claim before the referee in bankruptcy, after the trustee in bankruptcy representing the creditors has in an independent action collaterally attacked and tested the validity of a judgment on which a claim is based (all upon order of the referee, based upon an application of creditors therefor), and after the trustee in bankruptcy has suffered a final judgment against him, both in the United States District Court where the original judgment was rendered, and in the Circuit Court of Appeals (in all of which proceedings the bankrupt joined with the trustee), and wherein fraud was "charged, denied and not proved," the same creditors cannot thereafter lawfully go before the referee with objections to the claim based upon the original judgment on

the charge "that the material allegations in the complaint (original complaint) were knowingly false; that the judgment was secured through the use of perjured testimony given by the plaintiff and that a fraud was thus committed on the court and the parties." The present Tenth Circuit opinion holds otherwise. This charge has reference to the complaint in the original action on which the original judgment resulted, and to testimony given in that action, all prior to the bankruptcy proceeding and subsequent to the commencement of the independent action by the trustee in both the District Court and the Ninth Circuit Court.

Beginning with *Vico v. Cohn*, 91 Cal. 129, 25 Pac. 970, and through a long line of Federal cases and California and Oklahoma cases, it has been uniformly held that "a showing of fraud practiced at such hearing of the original action will not suffice." This, from the leading opinion of *U. S. v. Throckmorton*, 98 U. S. 61, 66; 25 L. Ed. 93, where it is said that equitable aid will be granted where it appears that "by some fraud practiced directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court"; and at page 584 the opinion states "an examination of the authorities as to what fraud will warrant the aid of equity discloses that only upon proof of extrinsic and collateral fraud can a plaintiff secure equitable relief from a judgment; a showing of fraud practiced at the hearing of the original action will not suffice. This is characterized as intrinsic fraud and since there must be an end to litigation and such fraud was part of the case presented in the former suit, equity will not reopen the matter." Certainly false or perjured testimony or falsity in the allegations of the complaint are intrinsic

fraud, against which a defense may be made at the trial, and these issues were tendered by the charge of fraud in the proceedings had by the trustee in California in both the District Court and the Ninth Circuit Court, wherein he suffered final judgment against him, which we submit is binding upon these creditors. We submit that none of the issues in the contest before the referee, approved by the majority opinion (of the case at bar) namely, "that the material allegations in the complaint were knowingly false" and that the judgment (March 20, 1939) was secured through the use of perjured testimony given by Heiser, included any extrinsic fraud or any assertion thereof, whether measured by the cases cited or otherwise; and that if such fraud had reference to the underlying claim in the circumstances of the case at bar, then the judgment of the District Court at Los Angeles and of the Ninth Circuit Court being final against the trustee and the bankrupt, all subsequent to the date of adjudication, we have a clear case where the bankrupt himself and the present objecting creditors, through the trustee in bankruptcy upon the order of the referee, have instituted the attack in the California court. They have not been prevented from full participation therein and they are precluded from trying these intrinsic fraud issues again at this time before the referee.

Those questions that the trustee in bankruptcy, P. M. Jackson, raised in his proceedings in the California courts, on the order of the referee (or could have raised but failed to present, are waived) cannot be subsequently urged before the referee by the same creditors, upon whose application the referee made his said order to the trustee to take such proceedings. Neither the trustee nor the creditors may present their attack by piecemeal. *Jackson v.*

Irving Trust Co., 310 U. S. p. 621, 85 L. Ed. p. 10; *Titus v. Walleck*, 306 U. S. 282; *Chicot Co. Dist v. Baxter State Bank*, 308 U. S. 371, 378; *Grub v. Public Utility Com.*, 281 U. S. 470, 478, 479; *Moffett v. Robbins*, 81 Fed. (2d) 431; *In re Cherokee Public Service Co.* 94 Fed. (2d) 530; *Beneficial Loan v. Noble*, 129 Fed. (2d) 425.)

Conclusion.

The Tenth Circuit opinion in ruling that the referee can now, in face of this record and a well grounded plea of *res judicata*, hear and determine a fourth time, the charge that the material allegations of the complaint upon which the original judgment was obtained against Woodruff March 20, 1939, were knowingly false, that the said judgment was secured through the use of perjured testimony given by Heiser and that a fraud thus was committed on the court rendering the original judgment because such issues were never expressly adjudicated in favor of Heiser, is contrary to the foregoing ruling cases and the accepted law in all of the Circuits, and in this court, and it is a holding of the Tenth Circuit in conflict with the decision of the Ninth Circuit Court on the same matter in *Jackson, etc. v. Heiser*, 111 Fed. (2d) 310, and constitutes a decision on a most important question of bankruptcy law and equity which should be settled by this court.

We submit that this decision has so far departed from the accepted and usual course of jurisdictional proceedings in courts of bankruptcy before the referee and in equity proceedings, and so far sanctions such departure by the lower courts, as to call for an exercise of this court's power of supervision, and that a final determination of

this question is essential to the orderly and uniform administration of bankruptcy and equity cases.

Wherefore, it is respectfully submitted that this petition for writ of certiorari to reverse the judgment of the Circuit Court of Appeals for the Tenth Circuit in the case at bar should be granted.

Dated: October 5, 1945.

LEONARD J. MEYBERG,
Counsel for Petitioner

RUPERT B. TURNBULL,
T. G. GIBSON,
Of Counsel.

APPENDIX.

(1) Opinion of Tenth Circuit
In Case No. 3052.

(2) Opinion of Ninth Circuit
In Case No. 9356

(3) Opinion of Judge Rice, United States District Court
In Case No. 7623.

(4) Referee's Certificate on Review.

APPENDIX.

Opinion of Tenth Circuit (in Case No. 3052).

United States Circuit Court of Appeals, Tenth Circuit.

Willie Mae Woodruff; Howard L. Woodruff; Marguerite Woodruff; Leonard Woodruff, Jr.; Ida Belle Woodruff; and Leonard J. Woodruff, Appellants, vs. M. E. Heiser, Appellee. No. 3052—May Term, 1945.

[August 11, 1945.]

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF OKLAHOMA.

Louis A. Fischl and Thos. W. Champion (H. A. Ledbetter was with them on the brief) for Appellants.

Leonard J. Meyberg and Rupert B. Turnbull (T. G. Gibson was with them on the brief) for Appellee.

Before Phillips, Bratton and Huxman, Circuit Judges.

Bratton, Circuit Judge:

This is an appeal from a judgment allowing a claim in bankruptcy. A brief statement of the background may be helpful in understanding the manner in which the questions for determination arise. In 1935, M. E. Heiser sued Leonard J. Woodruff and others in the United States Court for Southern California. It was alleged in the complaint that plaintiff had been and was engaged in the business of mining and marketing raw gems, particularly emeralds, sapphires, and zircons; that in 1928, he arrived in the United States from Australia on a business trip to find and establish a regular and ready market for raw gems, mined under his control and management in Australia; that he then owned and had in California certain sapphires, opals, zircons, and jade; that such gems were reasonably worth $164,000; and that the defendants cheated and defrauded him out of them. The defendant Woodruff failed to answer

or otherwise plead in the case; plaintiff submitted evidence and on March 20, 1939, the court entered judgment against such defendant for $164,000; together with accrued interest, aggregating $277,036.71. The defendant filed a motion to set aside the judgment. The motion was denied. The parties stipulated that the court might hear evidence respecting the value of the property of plaintiff for which damages were awarded in the judgment; and that should the court find the value to be less than the amount of the judgment, the judgment should be modified and reduced to the amount which represented the value of the property. On June 29, 1939, after hearing evidence, the court found the value of the property to be the amount fixed in the judgment.

Woodruff filed in the United States Court for Eastern Oklahoma his voluntary petition in bankruptcy; and, on July 5, 1939, an order of adjudication was entered. Heiser filed in the proceeding an unsecured claim, based upon the judgment. The referee entered an order authorizing any creditor of the estate to contest any claim filed. Willie Mae Woodruff, wife of the bankrupt, and Ida Belle Woodruff, as creditors, filed objections to the claim of Heiser and the bankrupt also filed objections. The referee authorized the trustee to employ an attorney in California and take such legal steps as seemed necessary and proper to vacate the judgment. The trustee and Woodruff filed in the cause in California a joint motion to vacate the judgment, vacate the default, vacate the orders entered after the rendition of the judgment, permit Woodruff to answer, and permit the trustee to intervene. The court denied the motion. Woodruff and the trustee appealed, and the order was affirmed. Jackson v. Heiser, 111 F. (2d) 310. The referee later heard evidence and disallowed the claim of

toto; on review, the district court entered judgment allowing it in full; and by order, the court authorized the objecting creditors to appeal from the judgment.

The action of the district court in allowing the claim was predicated upon the conclusion that the proceedings in California constituted res judicata of the matters set up in the objections. Section 2 of the Bankruptcy Act, as amended, 52 Stat. 840, 11 U. S. C. A. §11, provides among other things that the district courts sitting in bankruptcy shall be vested with such jurisdiction in law and in equity as will enable them to exercise original jurisdiction in proceedings under the act, and that they may make such orders and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of the act. A court of bankruptcy is essentially a court of equity, and its proceedings are inherently proceedings in equity. It exercises equitable powers of wide sweep in relation to problems arising out of the administration of bankrupt estates; and, with appropriate regard for rights acquired under the law of the state, its equitable powers may be exerted in full vigor with respect to the allowance of claims, the rejection of claims, of the subordination of claims to other claims. Pepper v. Litton, 308 U. S. 295; Prudence Realization Corp. v. Geist, 316 U. S. 89.

A bankruptcy court in which an estate is being administered has full power to inquire into the validity of an alleged debt of the bankrupt upon which a claim against the estate is based. And the merger of the original debt or obligation into judgment does not take away the power of the bankruptcy court to inquire into its provability. Notwithstanding the change in form of the liability from a simple contract debt, or an unliquidated claim, into a judg

ment of a court of record, it remains the same debt and the bankruptcy court may look behind the judgment to determine the essential nature of the liability for purposes of proof and allowance or rejection. Pepper v. Litton, *supra*. And in the absence of a well grounded plea of *res judicata* the trustee in bankruptcy may collaterally attack a judgment which is presented as a claim against the estate on the ground that it was founded upon no real debt of the bankrupt. Pepper v. Litton, *supra*.

The claim of Heiser was contested on the grounds that no personal service of summons was had upon the defendant Woodruff in the action in California; that the complaint filed in the action failed to state a cause of action under the laws of California; that the complaint showed on its face that if plaintiff ever had any cause of action, it was barred by the statutes of limitation of California; and that the judgment was void for the reason that the complaint undertook to state three separate and distinct causes of action and the judgment failed to specify the cause upon which it was rendered. By the motion to vacate the judgment, set aside the default, vacate the orders entered after the rendition of the judgment, and permit the interposition of a defense to the action, the trustee and the defendant Woodruff expressly attacked the judgment on these grounds, and others. The trustee was acting for all of the creditors of the estate of the bankrupt, and the determination of such issues adverse to him constitutes *res judicata* here to that extent and protects the judgment against collateral attack on those grounds. Pepper v. Litton, *supra*.

But the grounds of contest did not end there. It was specifically charged in the objections that at the time of the filing of the suit in California and at the time of the

rendition of the judgment, Woodruff was not indebted to Heiser in any amount; that the material allegations contained in the complaint were untrue; that the judgment was obtained through the use of perjured testimony given by Heiser; and that he thus committed a fraud upon the court and the parties. The record fails to indicate that these matters were placed before the court in California, either in the motion of the defendant Woodruff to vacate the judgment, by the motion of the trustee and the defendant Woodruff to set aside the judgment, or otherwise. Therefore the judgment did not constitute *res judicata* in respect of these issues, and the claim was open to attack on these grounds. Pepper v. Litton, *supra*. In reaching this conclusion we are mindful of the statement in Jackson v. Heiser, *supra*, that the charge of fraud in obtaining the judgment was denied, not proved, and apparently abandoned. But the nature of the fraud referred to does not appear. And the record before us does not contain any showing that the contention that the material allegations in the complaint were knowingly false, that the judgment was secured through the use of perjured testimony given by Heiser, and that a fraud thus was committed on the court and the parties was ever submitted to the court in California by motion to vacate the judgment or otherwise, or that such issues were ever expressly adjudicated by that court in favor of Heiser.

The evidence concerning the claim was extensive and presented issues of fact. But the court did not make any formal findings of fact or conclusions of law. It was the duty of the court to make findings and conclusions, in accordance with Rule of Civil Procedure, 52(a). And where the issues cannot be decided satisfactorily on appeal without findings of fact by the trial court, the judgment may

be vacated and the cause remanded in order that findings of fact may be made. Mayo v. Lakeland Highlands Canning Co., 309 U. S. 310; Kelley v. Everglades Drainage District, 319 U. S. 415.

Where the trial court embodied in its written opinion specific findings on the material issues of fact and set out conclusions on the important questions of law involved, the cause should not be remanded for formal findings and conclusions. Carter Coal Co. v. Litz, 140 F. (2d) 934. The court rendered an opinion in writing, but it does not present the findings or conclusions of the court upon the issues open to inquiry concerning the debt or obligation underlying the judgment. And the issues can not be satisfactorily decided on appeal without findings of fact.

The provision in the judgment allowing the claim of Heiser is vacated, and the cause is remanded for appropriate action in conformity with this opinion.

Huxman, Circuit Judge, Dissenting:

I think the judgment of the lower court is right and should be affirmed on the ground that the issue presented is *res judicata*.

It is of course well settled that a bankruptcy court is not precluded from inquiring into the validity of a claim by the mere fact that it has been reduced to judgment, but where the validity of the judgment has been adjudicated since its entry, no good reason appears why a court of bankruptcy under its equitable powers should again relitigate the same issue.

The gist of the fraud with which Heiser was charged and which was made the basis of the attempt to defeat his claim in the bankruptcy court was that he panned off a bunch of worthless stones as jewels, and by the use of

perjured and false testimony as to their value obtained a default judgment in the California court which now is the basis of his claim. This is the only fraud with which he has ever been charged. It is the basis of every effort of the Woodruffs or of the trustee to resist his claim.

In my view, this question of fraud in the procurement of the default judgment has been adjudicated twice since its entry. It was first adjudicated at the hearing on Woodruff's motion to set aside the default judgment, which was filed nine days after the entry thereof. While the record is not as clear on this point as might be desired, the charge must have been made at that time that the judgment was fraudulent because the gems had no value. This must have been so because while the court refused to set the default aside, it was stipulated in open court that the court should hold a hearing as to the value of the gems, and that the amount of the judgment should be modified if required in accordance with the evidence produced at such hearing. Pursuant to this stipulation a lengthy hearing was had in which both Woodruff and Heiser appeared and participated. At the end of that adversary hearing, the court found the value of the property to be the amount of the judgment and accordingly refused to modify the judgment. So it appears that Woodruff got everything he would have gotten had his motion been sustained and had he been permitted to answer and defend.

Immediately after the court ruled against Woodruff, he went into bankruptcy, and this proceeding resulted. The order of the court refusing to modify the amount of the judgment was entered June 29, 1939. On July 5, 1939, Woodruff was adjudged a bankrupt on his voluntary petition in the United States District Court for the Eastern District of Oklahoma. Jackson was appointed trustee on

July 20, 1939. On September 11, 1939, pursuant to authority theretofore obtained, he filed a notice of motion to vacate the default judgment in the United States District Court of California where the default judgment had been obtained. He also filed an affidavit of merit in support of his motion. The notice set forth many grounds in support thereof. Among others, it stated that the motion "will be made upon the ground that a fraud was practiced upon the above entitled court with respect to the entry of said judgment." The affidavit of merit by the trustee in support of the motion to set the judgment aside, among others, recited upon information and belief that the "judgment . . . . . is based upon fictitious values and was obtained by methods which amounted to a constructive fraud . . . . and in the event said judgment is set aside the alleged claim of said M. E. Heiser can be defeated in whole at a trial on the merits."

So here we have a direct attack upon the validity of the judgment on account of fraud in its procurement by the trustee himself. He failed in this attack in the California District Court. Why should he be permitted to raise the same question again a second time in the United States District Court of Oklahoma?

I cannot agree with the statement in the majority opinion that the issue of fraud in the procurement of the original judgment by the use of false and fraudulent testimony as to the value of the gems was not placed before the California court by the trustee's motion and supporting affidavit. The notice of motion alleged fraud and the affidavit stated that the judgment was based upon fictitious values and was obtained by methods that amounted to a constructive fraud. This could mean only one thing, namely, that the testimony as to the value of the gems was fictitious.

false and fraudulent. Heiser's affidavits denied that any fraud was practised upon the court. This presented a clear-cut issue of fraud in the procurement of the judgment. It was the duty of the trustee to substantiate the charge. This he failed to do.

Nor is it sufficient to say that the trustee was denied the opportunity to introduce oral testimony to support the charge. The record does not reveal that any oral testimony was offered or that the trustee was denied the right to introduce any testimony. But if he was denied this right, he should have raised the question when he appealed the case to the Circuit Court of Appeals.

Apparently the trustee abandoned the charge of fraud both in the California District Court and in the Circuit Court of Appeals. See Jackson v. Heiser, 111 F. (2d) 310. But this he will not be permitted to do. One of the issues presented by both Woodruff and the trustee in their motions to vacate the judgment was fraud in the use of false and fictitious testimony relating to the value of the stones. The issue as tendered was broad enough to prove every kind and nature of fraud. It is incumbent upon one attacking the validity of a judgment to present every available ground of which he has knowledge. He may not present his claim by piece meal: Grubb v. Public Utility Com., 281 U. S. 470, 478, 479. It is not claimed that the trustee was without knowledge of the claimed facts which would have enabled him to present the issue. He had the active help and assistance of Woodruff throughout in his efforts to vacate the judgment. Woodruff filed a motion with him to vacate this judgment.

The Circuit Court of Appeals of the Ninth Circuit treated the motion of the trustee as an independent action

or proceeding attacking the judgment. The trustee tendered the issue of fraud in this proceeding and was defeated. He appealed, and abandoned the charge of fraud. A judgment is *res judicata* not only as to those matters which were decided, but also as to all matters which could have been presented for decision. Chicot Co. Dist. v. Bank, 308 U. S. 371, 378. Two attacks have already been made upon this judgment since its entry on the ground there was no value to these stones and that the testimony establishing the value was fraudulent, fictitious and perjured. I do not think that either the Woodruffs or the trustee is entitled to try the issue a third time.

A true copy.

Attest: ROBERT B. CARTWRIGHT,
Clerk U. S. Circuit Court of Appeals, Tenth Circuit.

[SEAL.] By GEORGE A. PEASE,
Chief Deputy Clerk.

Opinion in Ninth Circuit (in Case No. 9356).

United States Circuit Court of Appeals for the Ninth Circuit.

P. M. Jackson, trustee in bankruptcy of the estate of Leonard Woodruff, a bankrupt, and Leonard Woodruff, Appellants, vs. M. E. Heiser, Appellee. No. 9356.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

Before Denman, Mathews and Stephens, Circuit Judges.

Mathews, Circuit Judge:

This appeal is from (1) an order which, on June 29, 1939, refused to modify a default judgment in an action for damages for conversion of property and (2) an order which on September 26, 1939, denied a motion to vacate the judgment, set aside the entry of default and permit answers to be filed.

The action was brought by appellee, M. E. Heiser, against Leonard Woodruff and others in the District Court of the United States for the Southern District of California. Appellee is a British subject. Woodruff is a citizen of California and a resident of the Southern District thereof. One of Woodruff's co-defendants is a citizen of Nevada. The others are citizens of California. The amount in controversy exceeded, exclusive of interest and costs, the sum of $3,000. The District Court has jurisdiction of the action.

The action was commenced on July 11, 1935. Summons was issued on that day, but, being unable to find the defendants, the marshal returned that summons unserved. Another summons was issued on April 21, 1937. On January 25, 1939, E. M. Daniels was specially appointed

by the court to serve the summons and complaint on Woodruff,[1] but Daniels never made such service. The marshal on January 31, 1939, did make such service by leaving copies of the summons and complaint at Woodruff's dwelling house and usual place of abode with a person of suitable age and discretion then residing therein.[2]

On February 23, 1939, it appearing by affidavit and otherwise that Woodruff had failed to plead or otherwise defend, the clerk entered his default.[3] Thereafter appellee applied to the court for judgment. The court, on March 20, 1939, concluded a hearing to determine the amount of damages and, at the conclusion thereof, entered judgment against Woodruff for $164,000, with interest and costs.[4] From that judgment no appeal was taken.

On March 29, 1939, Woodruff filed a motion to vacate the judgment, set aside the entry of default and permit him to answer. The motion was heard on April 10, 1939, and, by an order entered on June 8, 1939, was denied. From that order no appeal was taken.

On May 25, 1939, appellee and Woodruff stipulated in open court that the court might hear evidence as to the value of the converted property, and that, if the value thereof was found to be less than the amount ($164,000) awarded by the judgment, the judgment might be modified accordingly. On June 29, 1939, a hearing was had, pursuant to the stipulation. Both parties (appellee and Woodruff) appeared and participated in the hearing. The court

---

[1] Federal Rules of Civil Procedure, Rule 4(c).

[2] *Id.*, Rule 4(c), (d) (1).

[3] *Id.*, Rule 55(a).

[4] *Id.*, Rule 55(b) (2).

found that the value of the property was the amount awarded by the judgment. Accordingly, by an order entered on June 29, 1939, the court refused to modify the judgment.

On July 5, 1939, Woodruff was adjudged a bankrupt. On July 20, 1939, P. M. Jackson was appointed and qualified as trustee in bankruptcy of Woodruff's estate. On September 26, 1939, pursuant to written notice theretofore served and filed Jackson and Woodruff (hereafter called appellants) moved the court to vacate the judgment in the law action, set aside the entry of default and permit the filing of answers by appellants. The motion was heard and, by an order entered on September 26, 1939, was denied. From that order and the order of June 29, 1939, this appeal was taken on September 29, 1939.

The order of June 29, 1939, was not a final decision, within the meaning of Section 128 (a) of the Judicial Code, 28 U. S. C. A., Section 225(a), and was not appealable.

Republic Supply Co. v. Richfield Oil Co., 9 Cir., 74 F. (2d) 909, 910; Benson v. United States, 9 Cir., 93 F. (2d) 749, 751.

A claimed ground of appellants' motion of September 26, 1939, was that the judgment was obtained without valid service of process. Another claimed ground of the motion was that the judgment was obtained by fraud. Thus, by their motion, appellants instituted what was, in effect, an independent action or proceedings. Hence, the

order of September 26, 1939, was a final decision, within the meaning of Section 128(a) of the Judicial Code, 28 U. S. C. A., Section 225(a), and was appealable Stevirmac Oil Co. v. Dittman, 245 U. S. 210, 214, 216; Rust v. United Waterworks Co., 8 Cir., 70 F. 129, 132.

The District Court properly refused to vacate the judgment as having been obtained without valid service of process. For, as previously shown, service was made on January 31, 1939, in accordance with Rule 4 of the Federal Rules of Civil Procedure then in effect, and was, we think, valid service. Furthermore, even if not validly served with process Woodruff, by entering into the stipulation of May 25, 1939, and by participating in the hearing of June 29, 1939, waived such service and voluntarily submitted himself to the jurisdiction of the court.

The charge that the judgment was obtained by fraud was denied and not proved. That ground of appellants' motion appears to have been abandoned. Other claimed grounds of the motion were that the judgment was prematurely entered and was otherwise erroneous; that the complaint did not state a cause of action and was otherwise defective; and that the complaint showed on its face that the action was barred. These were matters which, if true, might have been urged as defenses or, if the judgment had been appealed from, as grounds for reversal. They were not grounds on which, without more, the court rendering the judgment could properly vacate it.

As further (and final) ground of their motion appellants stated that they, Jackson and Woodruff, had a good

defense to the action, but were prevented from presenting it by reason of fraud, accident, surprise and excusable neglect. The statement that Jackson had a defense to the action and was prevented from presenting it was obviously untrue, as he was not a party to the action. As to Woodruff, the court apparently disbelieved the statement and disbelieved the evidence, if any, tending to support it. In this, we cannot say that the court erred, much less that it abused its discretion.

The appeal, insofar as it is or purports to be an appeal from the order of June 29, 1939, is dismissed.

The order of September 20, 1939, is affirmed.

WILLIAM DENMAN,
United States Circuit Judge.

CLIFTON MATHEWS,
United States Circuit Judge.

ALBERT LEE STEPHENS,
United States Circuit Judge.

[Filed April 30, 1940.]

Opinion of Judge Rice, United States District Court (in Case No. 7623).

In the District Court of the United States, for the Eastern District of Oklahoma.

In the Matter of the Bankruptcy of Leonard J. Woodruff, Debtor. No. 7623 in Bankruptcy.
[Filed June. 23. 1944.]

MEMORANDUM.

On July 5, 1939, Leonard J. Woodruff (hereinafter referred to as the bankrupt), was adjudged to be a bankrupt by this court upon his voluntary petition filed herein. This was but a few days after the United States District Court for the Southern District of California, Central Division, had refused after a hearing to modify a judgment which had been entered against the bankrupt on March 20, 1939. Prior thereto, the United States District Court for California had refused to set aside an entry of default judgment against the bankrupt. It is my conclusion that the action of the California Court in refusing to set aside the default judgment and to modify the judgment after a hearing precipitated the filing of the bankruptcy in this court. The chief controversy in this proceeding has centered upon the contest between Heiser and the bankrupt and has had to do with the judgment mentioned above.

In the bankruptcy proceeding three groups of claims have been filed: (1) Claim of Heiser, based upon his judgment, (2) Claim of Willie May Woodruff, wife of the bankrupt, and (3) The claims of Howard L. Woodruff, Margueritte B. Woodruff and Leonard Woodruff, Jr., children of the bankrupt. The claim of Heiser was

denied by the referee. The claim of Willie May Woodruff, the wife, was allowed by the referee in the total amount of $812,176.15, being $477,750.68 principal and $334,425.47 interest to the date of the order. The claim of Howard L. Woodruff was allowed for the total sum of $75,177.12. The claim of Margueritte B. Woodruff was allowed in the total sum of $83,097.33. The claim of Leonard Woodruff, Jr., was allowed in the total sum of $53,097.33. The action of the referee in disallowing Heiser's claim and in allowing the claim of the wife and the claims of the children are now here on bill of review brought by Heiser.

The bankrupt, his wife and three children, objected to Heiser's claim. Heiser objected to the claim of the wife and the claim of each of the children except that Heiser admitted the claim of the wife should be allowed to the extent of $18,000.00 and that the claim of Howard L. Woodruff should be allowed in the sum of $2,048.75.

The three groups of claims will be discussed separately.

CLAIM OF HEISER.

P. M. Jackson, an attorney of Ardmore, Oklahoma, was appointed and qualified as trustee in bankruptcy of the bankrupt's estate. Early in these proceedings the trustee joined by the bankrupt and the other two groups of creditors applied to this court for authority to begin proceedings in the United States District Court for the Southern District of California to vacate and set aside the judgment rendered therein. The trustee was authorized by this court to employ competent counsel in California to represent him, to take all necessary and proper steps to vacate the Heiser judgment. This the trustee did. The bankrupt joined in the action begun by the trustee. The

result of their efforts is disclosed in the decision of the Circuit Court of Appeals of the Ninth Circuit, Jackson v. Heiser, 111 Fed. (2d) 310. The history of this judgment is well disclosed in the opinion of the Circuit Court, *supra*. It is not necessary herein to recount the facts set forth therein.

The referee in his certificate of review states that two questions are presented: (1) Does the judgment prevent the bankruptcy court from considering the underlying claim of Heiser and allowing or disallowing it in whole or in part? (2) Is the evidence of objectors sufficient to defeat the claim? The referee answered the first question in the negative, the second in the affirmative, and disallowed the claim. In my opinion the referee erred in answering the first question as he did, and it was not necessary to consider the second.

The Heiser judgment was and is a final judgment entered by a United States District Court, a member of the same judicial body of which this court is a member. Before reaching this court for decision in bankruptcy it had been attacked by both the bankrupt and the trustee in bankruptcy who was acting for the benefit of the other creditors. The judgment had the approval not only of the trial court but of the Circuit Court. It is *res judicata* as to all matters actually litigated or which might have been litigated therein. Moffett v. Robbins, 81 Fed. (2d) 458; *In re* Cherokee Public Service Co., 94 Fed. (2d) 53[illegible].

Section 63 a (1) of the Bankruptcy Act (11 U. S. C. A. Sec. 103 (a) (1), is applicable and provides debts of bankrupt are provable and allowable which are founded upon

"* * * a fixed liability as evidenced by a judgment * * * absolutely owing at the time of the filing [illegible]

petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date * * *"

For a discussion on the conclusiveness of judgments in bankruptcy, see Gilbert's Collier on Bankruptcy, Fourth Edition, Sec. 1247, page 608; also Collier on Bankruptcy, 14th Edition, Vol. 3, page 1817; Murphy v. McLoughlin, 247 Fed. 385; Beneficial Loan Co. v. Noble, 129 Fed. (2d) 425.

In Pepper v. Litton, 308 U. S. 295, the Supreme Court held that the attack of a trustee in the state court upon the judgment involved therein was not *res judicata*. In the opinion the court said:

"And the bankruptcy trustee may collaterally attack a judgment offered as a claim against the estate for the purpose of showing that it was obtained by collusion of the parties or is founded upon no real debt."

and in a foot-note the court said with respect to the above statement:

"This is, of course, in absence of a plea of *res judicata*."

In his application to this court by the trustee in which application the objectors joined to attack the Heiser judgment, it was stated that the judgment was based upon an erroneous, unjust and void judgment and was without merit. The order of this court to the trustee was full and complete authorizing him to do any and all things necessary and proper to avoid the judgment and thus defeat any claim based thereon. The purpose in authorizing the trustee to begin such proceedings was to defeat the judgment and thus avoid a claim based thereon in the bankruptcy proceedings. Had the trustee succeeded in his action, Heiser's claim based upon the judgment would

have been defeated; and had Heiser's judgment been defeated, that would have been an adjudication against him as to all his rights against the bankrupt. I think it follows that an adverse decision on the action begun by the trustee and the bankrupt is *res judicata* in favor of Heiser. See Beneficial Loan Co., v. Noble, 129 Fed. (2d) 425. For the effect to be given by this court, to the judgment of another United States District Court, see Caterpillar Tractor Co. v. International Harvester Co., 120 Fed. (2d) 82; Baldwin v. Iowa State Traveling Mens Association, 283 U. S. 522.

The action of the referee in disallowing Heiser's claim is error. The petition for review is allowed, and the referee's decision is reversed.

THE WIFE'S CLAIM.

Willie Mae Woodruff, the wife, bases her claim upon a trust created in her behalf whereby the bankrupt in the capacity of trustee handled her money and made investments for her. Admittedly, the bankrupt under an oral agreement with his wife at a time when both were prospering, invested his wife's money in securities, buying and selling them very much as he pleased. It was the wife's contention that the bankrupt was not to speculate with her funds. The evidence, however, discloses that the wife was at all times informed generally as to the transactions being had by the bankrupt. The investments by the bankrupt were in various securities, and, when the crash came most of the bankrupt's cash and that of the wife were lost. The bankrupt had been purchasing stocks on a marginal basis on the New York Stock Exchange. In 1931 the bankrupt had difficulties with the United States government in connection with his income taxes. All his cash and securities, and all of his wife's cash and

securities with the exception of $18,000.00 was required to relieve the bankrupt of the difficulties in which he found himself. The record discloses that the wife knew in general how the bankrupt was handling his money and that she acquiesced therein.

My conclusion is that the wife authorized the bankrupt to invest her money in any way in which the bankrupt in good faith believed would be to the best interest of his wife. The wife does not question the good faith of the bankrupt. On the contrary, she admits it. The wife knew in 1931 that her securities were being sold to pay income taxes and that she had lost her investments, yet she made no objection until the institution of this bankruptcy proceeding. Under this state of the record, the claim of the wife should not have been allowed in excess of $18,000.00. The referee's decision allowing the claim in full is reversed, and said claim is allowed for $18,000.00 and no more.

THE CHILDREN'S CLAIMS

The claims of the children are based upon alleged trusts created approximately twenty years before bankruptcy. The claimants present their claim upon the theory of a trust. The objector, Heiser, discusses their claims upon the theory of gifts *inter vivos*. The referee, after a hearing, determined that under the facts there was created a trust by the bankrupt in favor of each of the children in which trust the bankrupt was the trustee. These separate trusts were created by the purchase of certain stock for one or the other of the children. The evidence discloses the stocks that were purchased and the amount thereof and conclusively shows that these stocks were converted by the bankrupt many years ago.

The decision of the referee finding that there was a trust is sustained. However, the amount of the claim as

to each of the children should be reduced in the amount of $9,925.83 plus $11,132.50, or a total of $21,058.33. The reason for this reduction is as follows: The evidence in support of the creation of a trust was the evidence of the bankrupt himself, sustained by certain corroborating facts. The evidence of the bankrupt shows that the $9,925.83 item, plus the $11,132.50 mentioned above, was an investment in Imperial Irrigation bonds; that a short time after purchasing the Imperial Irrigation bonds he concluded that they were not a good investment and traded them for the Salt River Valley Water Users Association bonds; that the latter bonds proved to be more valuable; that the bankrupt subsequently converted and appropriated the Salt River Valley Waters Users Association bonds. The amount of the claim as approved by the referee includes the value of both bonds plus the interest upon the value of the bonds. The bankrupt did not make two investments for his children. He merely changed the form of an investment. There were not two additions to the corpus of the trust estate—there was only one; and the bankrupt's estate is chargeable only with the value of the Salt River Valley Water Users Association bonds. Included in the claim of each child, and allowed by the referee, is the item of $9,925.83, the value of the Imperial Irrigation bonds, plus $11,132.50 accumulated interest. This amount should be deducted from the claim of each child; and as modified the decision of the referee as to the claim of each of the children is approved.

An order conforming to the views herein is this date entered.

This the 23rd day of June, 1944.

EUGENE RICE,

United States District Judge.

In the District Court of the United States, for the Eastern District of Oklahoma.

In the Matter of the Bankruptcy of Leonard J. Woodruff, Debtor. No. 7623 in Bankruptcy

[Filed June 24, 1944.]

ORDER

Now on this 24th day of June, 1944, this case comes before this court for consideration on three separate certificates on review filed by the referee in bankruptcy, and based on petitions for review filed by M. E. Heiser, seeking review of an order of the referee disallowing the claim of Heiser in the amount of $278,631.71, an order allowing the claim of Howard L. Woodruff in the amount of $75,177.12, the claim of Margueritte B. Woodruff in the amount of $83,097.33, and the claim of Leonard Woodruff, Jr., in the amount of $53,097.33, and an order allowing the claim of Willie May Woodruff in the sum of $812,176.15.

On consideration of the briefs and oral arguments of the parties, the court being fully advised in the premises, is of the opinion and finds that the referee erred in denying the claim of M. E. Heiser, and that such claim should be allowed; that the referee erred in allowing in full claims of Howard L. Woodruff, Margueritte B. Woodruff and Leonard Woodruff, Jr., and that each of such claims should be reduced in the amount of $21,058.33, and allowed as so reduced; and that the referee erred in allowing in full the claim of Willie May Woodruff, and that such claim should be denied except as to the sum of $18,000.00, in which amount she admittedly has a valid claim, and that such claim should be allowed in the amount of $18,000.00

It is, therefore, Ordered, Considered, Adjudged and Decreed that the petition for review of the Heiser claim is sustained; that the referee's order disallowing the said claim is set aside; and that the claim of M. E. Heiser in the amount of $278,631.71 is allowed.

It is further Ordered and Decreed that the petition for review of the referee's order allowing the claims of Howard L. Woodruff, Marguerite B. Woodruff and Leonard Woodruff, Jr., is sustained; that the referee's order allowing such claims is amended as to the amount of the claims; and that the claim of Howard L. Woodruff is allowed in the sum of $54,118.79, the claim of Marguerite B. Woodruff is allowed in the sum of $62,039.00, and the claim of Leonard Woodruff, Jr., is allowed in the sum of $32,039.00.

It is further Ordered and Decreed that the petition for review of the referee's order allowing in full the claim of Willie May Woodruff is sustained; that the referee's order is modified, and that the claim of Willie May Woodruff is allowed in the sum of $18,000.00, and is otherwise disallowed.

EUGENE RICE,

United States District Judge.

Referee's Certificate on Review.

To the Hon. Eugene Rice, District Judge:

154 I, Geo. F. Clark, Referee in Bankruptcy, do hereby certify that in the course of this proceeding an order was made disallowing the unsecured claim of M. E. Heiser, a copy of which order is hereto attached.

Petition for Review of said order was filed by M. E. Heiser.

A claim was filed by said M. E. Heiser against the bankrupt estate in the sum of $278,631.71, the consideration as set forth in the proof of debtor being: Liability for obtaining property of affiant consisting of rough sapphires, opals and zircons of the value of $184,000.00 by false pretenses and false representations through willful, wrongful and fraudulent conversion thereof on May 13, 1929, together with interest thereon at the rate of 7% per annum, amounting to $113,036.71 and costs of $1,595.00 fixed by and reduced to judgment in the District Court of the United States in and for the Southern District of California, Central Division, made, entered and filed in said County on March 20, 1939, in favor of M. E. Heiser, deponent herein, as plaintiff, and against Leonard Woodruff, bankrupt herein, as defendant; certified copy of which judgment of said United States Court is marked Exhibit "A", is hereto annexed and referred to as a part hereof.

A supplement to proof of claim of M. E. Heiser was thereafter filed.

Objections to claim of M. E. Heiser were filed by Leonard J. Woodruff, debtor, a petition for arrangement made under Chapter 11 having been filed by said Woodruff and an order made staying administration. Objections to the Heiser claim were also filed by Willa May Woodruff

Ida Belle Woodruff, Howard W. Woodruff, Margueritte B. Woodruff,, and Leonard Woodruff, Jr., creditors. Answers to the objections were filed by M. E. Heiser. Amendments to their objections to Heiser claim were filed by Ida Belle Woodruff and Willie May Woodruff.

The questions presented on this review are:

1. Does the default judgment of March 20, 1939, against Leonard Woodruff in favor of M. E. Heiser, the judgment of September 26, 1939, denying the Motions of P. M. Jackson, Trustee in Bankruptcy, and Leonard Woodruff, Debtor, and the decision of the Circuit Court of Appeals affirming the judgment of September 26, 1939, prevent the Bankruptcy Court from considering the underlying claim of M. E. Heiser and allowing or disallowing in whole or in part the claim of said M. E. Heiser as filed in the bankruptcy court?

155 2. Is the evidence produced by the objectors in opposition to the claim of M. E. Heiser sufficient to defeat such claim?

Res Adjudicata.

The original suit of Heiser vs. Woodruff *et al* was filed in the California Court on July 11, 1935. Woodruff was served with summons on January 31, 1939 and on the 23rd day of February, 1939, the default of Woodruff was entered by the Clerk of said Court.

On March 20, 1939, the judgment which is the basis of the Heiser claim was entered and on March 29, 1939, a Motion was filed by Woodruff to set aside the default judgment, and on June 8, 1939, an order was made denying Woodruff's Motion but providing that hearing be held to determine value of the property (gems); on June 29, 1939,

the value of the property was fixed at the amount fixed in the judgment.

On July 5, 1939, Woodruff filed voluntary petition and was adjudged bankrupt the same day.

On August 23, 1939, upon application of P. M. Jackson, Trustee of the estate of Leonard J. Woodruff, bankrupt, an order was made by the Referee in Bankruptcy authorizing and directing said Trustee to take such action as might be necessary to have set aside the default judgment.

On the 28th day of September, 1939, the Motion of the Trustee was denied as was also the Motion of Leonard J. Woodruff. An appeal from the order of June 29, 1939, and from the order of September 26, 1939, was taken and Circuit Court of Appeals of the Ninth Circuit dismissed the appeal as to order of September 29, 1939 and affirmed the order of September 26, 1939. The decision of the Circuit Court of Appeals is reported in 111 Fed. (2d) 310.

Objectors' Exhibit DD, 7-27-42, is a certified transcript of Record, upon appeal from the District Court of the United States, for the Southern District of California, Central Division, in No. 9356 United States Circuit Court of Appeals for the Ninth Circuit, P. M. Jackson, Trustee in Bankruptcy of the estate of Leonard Woodruff, a Bankrupt, and Leonard Woodruff, appellants, vs. M. E. Heiser, appellee.

156 This Transcript of Record (Ex. DD) apparently is a complete record of the proceeding in which Heiser obtained the default judgment and also the proceeding in connection with the Motion of P. M. Jackson, Trustee in Bankruptcy, and Leonard Woodruff.

Objectors' Ex. CC, 7-27-42, is a Reporter's Transcript of Argument on Mo. on to Vacate Judgment and set aside

Default on September 29, 1939. This is the Motion to set aside default judgment filed by P. M. Jackson, Trustee and Leonard Woodruff.

Objectors' Ex. RR is a transcript of hearing to determine value of the gems after the entry of the default judgment in favor of Heiser, against Woodruff.

UNDERLYING CLAIM.

Objectors produced a large amount of evidence in support of their objections. Depositions of numerous witnesses were taken. The claimant offered no evidence on this point but relied on his judgment.

M. E. Heiser came to San Francisco from Australia the end of 1914 or the early part of 1915 on account of the Panama Pacific Exposition at San Francisco.

According to the testimony of M. E. Heiser the uncut gems ($164,000.00) of uncut sapphires, etc.) were brought to San Francisco in 1915 or latter part of 1914 and amounted to several tons. Heiser testified at the hearing to re-determine values in Heiser v. Woodruff in the District Court of California: "I represented the Queensland Government at the Panama Exposition as their expert cutter for demonstration in 1915 in San Francisco cutting to demonstrate how the gems were cut and how they were mined." In his deposition in this proceeding he stated that he was not the official representative of any Government.

The depositions of three Australian officials were taken by objectors. As shown by these depositions Heiser was not an official representative of the Australian Government nor of any State Government of Australia. That
157 Heiser obtained permission to operate a small lapidist's bench in the Australian Pavilion. That

"one of the conditions of Mr. Heiser's tenancy [illegible] Australian Pavilion was that no articles were to be sold by him therein. As Mr. Heiser persisted in selling at his bench gemstones (chiefly rough potch opals), the Australian Commissioners withdrew his permit to exhibit within the Australian Pavilion."

Heiser had his space in the Australian Pavilion about a week.

According to Heiser's testimony when he discontinued operations at the Exposition the cheaper material was stored in warehouse and other places and the better materials in the Wells Fargo Bank in San Francisco.

All this material according to Heiser's testimony (being the $164,000.00 worth of uncut sapphires) remained in San Francisco in warehouse or Wells Fargo Bank until 1928 when it was shipped to Los Angeles. In Los Angeles it was stored in U. S. National Bank, Los Angeles, and none of the material was removed by anyone until it was removed under attachment in case of Woodruff vs. Golden State Gem Company.

Heiser went to Los Angeles in July, 1928, and shortly thereafter met Woodruff through one Calvin Smith who was connected with the Golden State Gem Company of California, a California Corporation. The Golden State Gem Company of Nevada, a Nevada Corporation, was thereafter organized. Woodruff appears to have owned no stock in either of these corporations. Woodruff did loan $10,000.00 to Smith in addition to amount then owing to him by Smith.

Heiser in August, 1928, left Los Angeles for Hollywood and did not return to Los Angeles until September or October, 1930.

In 1929 Woodruff filed suit against Golden State Gem Company of California and Golden State Gem Company of Nevada and the material in the U. S. National Bank was attached. The material was contained in thirty-six (36) sacks. At the sale Woodruff bought thirty-five sacks for $1000.00. One sack was purchased by James Oreck for his son. Oreck testified that he selected what he *though* was the best sack of material but that it proved later to be of no value.

While Heiser was in Europe the Golden State Gem Company of California was adjudged bankrupt. A claim was filed in the bankruptcy court for $30,250.00 in behalf of Heiser by his brother in law, which was disallowed and upon appeal the appeal dismissed.

158 I hand up herewith for the information of the Judge the following papers:

1. Brief of M. E. Heiser on Petition for Review.

The following briefs filed with Referee prior to order disallowing Heiser claim:

2. Brief on behalf of objectors to the claim of M. E. Heiser.

3. Reply brief in behalf of the claim of M. E. Heiser.

4. Petition for review.

5. Copy of order disallowing M. E. Heiser claim.

6. Copy of proof of debt of M. E. Heiser and Supplement thereto.

7. Objections of debtor, Leonard Woodruff, to claim of M. E. Heiser.

8. Answer to objections of Leonard J. Woodruff to M. E. Heiser.

9. Objections of Willie May Woodruff to claim of M. E. Heiser, and Amendment thereto.

10. Answer of M. E. Heiser to objections of Willie May Woodruff.

11. Objections of Ida Belle Woodruff to claim of M. E. Heiser and Amendment thereto.

12. Answer by M. E. Heiser to objections of Ida Belle Woodruff.

13. Objections of Howard Woodruff to claim of M. E. Heiser.

14. Answer of M. E. Heiser to objections of Howard Woodruff.

15. Objections of Margueritte Woodruff to claim of M. E. Heiser.

16. Answer of M. E. Heiser to objections of Margueritte Woodruff.

17. Objections of Leonard Woodruff, Jr., to claim of M. E. Heiser.

18. Answer of M. E. Heiser to objections of Leonard Woodruff, Jr.

19. Transcript of Hearing before Referee on objections to Heiser claim.

The following depositions taken on behalf of objectors:

20. Deposition of M. E. Heiser.

21. Deposition of D. K. Sterl.

22. Deposition of E. A. Lobree.

159 23. Deposition of Jefferson J. Graves.

24. Deposition of C. N. Olson, H. A. Dewing, C. W. McClain, J. A. Seelye, Francis B. Cobb, John Grable

Moran, Gean Kosto, Howard L. Woodruff, Charles B. Marlatt, Norman R. Dunn, Louis Oreck, and Claire E. Cone.

The following three (3) depositions were taken in Australia;

25. Deposition of Leo Joseph Jones.

26. Deposition of Adolphus Arnold Staines.

27. Deposition of David Barnett Edward.

28. Exhibits.

Dated at McAlester, said District, this the 28th day of January, 1944.

Respectfully submitted,

GEO. F. CLARK,
Referee in Bankruptcy.

Filed Jan. 29, 1944. John H. Pugh, Clerk, U. S. District Court.